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No. 82-1253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN S. SOLEM, *et al.*,
Petitioners,

v.

JOHN BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICI CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE, SOUTH DAKOTA, THE STANDING ROCK SIOUX TRIBE, NORTH AND SOUTH DAKOTA, AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE RESPONDENT

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The Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, the Standing Rock Sioux Tribe of the Standing Rock Reservation, North and South Dakota, and the Association on American Indian Affairs, Inc., submit this brief *amici curiae* in support of respondent pursuant to Rule 36(2). The parties have consented in writing to its filing.

INTEREST OF AMICI CURIAE

The specific question here presented is whether the Act of May 29, 1908, 35 Stat. 460 (hereinafter the "1908 Act"), disestablished parts of the Cheyenne River Reservation (hereinafter the "Reservation"), which are located

in Dewey County and Ziebach County, South Dakota. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century, usually without the consent of the affected Indian tribes, and which opened either all or some portions of the tribes' reservations to settlement by non-Indians.

The Cheyenne River Sioux Tribe (hereinafter the "Tribe") has a direct and immediate interest in proper resolution of the question before the Court because the Reservation, as undiminished, is its home. Approximately 66% of the members of the Tribe today reside within the area opened to settlement under the 1908 Act. U.S. Census Enumerated Districts, South Dakota, Nos. N009A-N0018, N10801A-N1830A, A0001-A0013B, A1800-A1838. *See* U.S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota). The town of Eagle Butte, inside the opened area, is the seat of both the tribal government and the Bureau of Indian Affairs Agency office. Approximately 79% of the total Eagle Butte population and approximately half the entire population in the opened area is Indian. U.S. Census Enumerated Districts, South Dakota Nos. A1812-14, A1822-27, *supra*. A decision which excludes the opened area from the Reservation, therefore, would seriously jeopardize the Tribe's ability to govern its members and to protect its lands.

The Standing Rock Sioux Tribe has an equally direct and immediate interest in the outcome of this case. The 1908 Act also affected portions of the Standing Rock Reservation located in Sioux County, North Dakota, and Corson County, South Dakota. Accordingly, a determination by the Court that the 1908 Act reduced the boundaries of the Cheyenne River Reservation undoubtedly would have like consequences with respect to the boundaries of the Standing Rock Reservation and the capacity of the Standing Rock Sioux Tribe to exercise its traditional powers of local self-government.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and the filings of briefs *amicus curiae* in *Ramah Navajo School Board* v. *Bureau of Revenue*, 102 S.Ct. 3394 (1982), *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). The Association has an interest in and deep concern about the outcome of this case because, as is evidenced by the *amici curiae* briefs in support of petitioners filed by eleven counties and two towns in six states, a finding here of disestablishment may serve to end the reservation status of tribal lands throughout the West and thus impose upon Indian country today a policy of "termination" which Congress long since has repudiated. *See Bryan* v. *Itasca County*, 426 U.S. 373, 387-88 (1976).

SUMMARY OF ARGUMENT

The issue in this case is whether the heart of the Cheyenne River Reservation—the part of the Reservation where over 65% of the Tribe's members reside, where a majority of all residents are Indians or otherwise directly associated with the Tribe, and where both the seat of tribal government and the Bureau of Indian Affairs Agency are located—was disestablished by the Act of May 29, 1908, ch. 218, 35 Stat. 460. That Act opened a portion of the Reservation to non-Indian settlement. Under the standards set forth by this Court in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz* v. *Arnett*,

412 U.S. 481 (1973), *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), the 1908 Act did not alter the Reservation boundaries.

Under this Court's rulings, certain factors—all looking toward an understanding of congressional intent—are of primary importance in determining whether a reservation has been disestablished. First, was there an agreement by the tribe involved to cede land to the United States for a sum certain, thus creating "an unmistakable baseline purpose of disestablishment"? *Rosebud*, *supra* at 592. Second, did the operative language of the statute expressly terminate the reservation, or at least contain clear language of cession "precisely suited" to disestablishment of its boundaries? *Ibid.* Last, was there a clear intent to disestablish expressed by Congress in the legislative history?

The Cheyenne River Sioux Tribe entered into no agreement to cede or relinquish any of the land opened under the 1908 Act either for a fixed consideration or otherwise. The 1908 Act contained no language terminating the Reservation and no language of cession; instead, the Act simply directed the Secretary of the Interior to "sell and dispose of" all unallotted lands on a portion of the Reservation. No Congressional Committee, and no member of Congress, spoke in terms of terminating the Reservation, changing Reservation boundaries, or a cession. Consistent with the operative language of the 1908 Act, statements by Congress in the legislative history of the 1908 Act contain references merely to "opening" the Reservation.

This Court never has found a reservation to be disestablished in such circumstances, nor has any lower court (except the Supreme Court of South Dakota in its construction of the 1908 Act). In *DeCoteau* and *Rosebud*, this Court found areas to be severed from reservations where less than ten percent of the population was Indian

and little of the land was Indian owned. The *Rosebud* decision left intact as a reservation the county where most Indians lived and the tribal government functioned. *DeCoteau*, *supra* at 428; *Rosebud*, *supra* at 605. At Cheyenne River, where the area opened in 1908 remains to this day predominantly Indian and a vital center of tribal life, a finding of disestablishment would have a disastrous cultural, political and economic impact on the Tribe and its members. As in *Seymour*, *supra* at 358, some parcels in the opened area are held in trust for the Tribe or individual Indians, while other tracts are owned in fee by non-Indians. The longstanding pattern of federal and tribal civil and criminal jurisdiction over Indians on all lands in the area would give way to state regulation and criminal prosecution of Indians on fee lands. More importantly, tribal self-government, "the right of Reservation Indians to make their own laws and be governed by them," [1] would be seriously undermined, as most tribal members no longer would be living on the Reservation. Perhaps most important, this Nation's promise of a homeland for the Tribe would be broken, without the Indians' agreement and without any clear expression that Congress intended such a harsh result.

While this case presents the most serious threat to the Tribe in its modern history,[2] few, if any, adverse consequences would follow for the State and non-Indians if reservation status in the opened area were still recognized. Indeed, the major effect of affirming the decision below would be that Indian criminal defendants who commit crimes on fee land would continue to be tried in federal or tribal courts, not in state forums. Non-Indians accused of crimes would continue to be tried in either federal or state courts, as at present, for since *Rosebud* and *DeCoteau* were decided, this Court has held that

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[1] Williams v. Lee, 358 U.S. 217, 220 (1959).

[2] *Compare, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980).

tribal courts have no criminal jurisdiction over non-Indians. *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978). Moreover, during the past few years, the Court also has ruled that the civil regulatory and taxing jurisdiction of Indian tribes over non-Indian activities is chiefly limited to trust lands. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana* v. *United States*, 450 U.S. 544 (1981). Accordingly, while a decision against continued reservation status would severely disrupt the lives of tribal members, fragmenting the part of the Reservation where the great majority of the Cheyenne River Sioux live and work and dislodging the authority of their government at its seat, a contrary holding would have little, if any, practical impact on the State or its non-Indian citizens.

ARGUMENT

1. Introduction.

The Court's opinions in *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz* v. *Arnett*, 412 U.S. 481 (1973), *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), provide the guiding principles for a decision in this case. The "underlying premise is that congressional intent will control." *Rosebud*, *supra* at 586. The "mere opening of a reservation to settlement" by non-Indians does not necessarily mean Congress intended to disestablish the reservation. *DeCoteau*, *supra* at 444. On the contrary, this Court has recognized a strong presumption in favor of continued reservation existence. As explicated in *DeCoteau*:

> This Court does not lightly conclude that an Indian reservation has been terminated. * * * The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona*

> *State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate . . . be *expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.*" *Mattz* v. *Arnett*, 412 U.S. at 505. [*DeCoteau, supra* at 444; emphasis added.]

In two recent cases, *Seymour* and *Mattz*, this Court held that statutes opening surplus unalloted lands to non-Indian settlement on the Colville and Klamath River Reservations did not alter Reservation boundaries. In *DeCoteau*, on the other hand, the Court found an unequivocal congressional intent to disestablish because " 'the face of the act', and its 'surrounding circumstances' and 'legislative history' all point[ed] unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." *DeCoteau, supra* at 445. Similarly, in *Rosebud* this Court held that a 1904 surplus lands statute had disestablished a portion of the Rosebud Sioux Reservation because "the process leading up to the enactment of the 1904 Act, as well as the language and legislative history, leads us . . . to the firm conclusion that congressional intent was . . ." to disestablish. *Rosebud, supra* at 603.

All seven of the surplus lands statutes in these four cases had some aspects in common, but not all the acts terminated reservation boundaries. Where the evidence of Congressional intent to disestablish reservation boundaries in less than "unmistakably" clear, the reservation continues undisestablished, as in *Mattz* and *Seymour*. *See DeCoteau, supra* at 445-49; *Rosebud, supra* at 586.

In seeking to ascertain Congressional intent, this Court has looked to a wide array of factors, of varying importance and utility. Three primary factors have emerged from the cases, providing harmony to this area of the law and guidance to the lower courts. These factors are:

1. Did the Indians make an agreement to cede their lands to the United States or agree otherwise that reservation boundaries would be altered?

2. Did the Act opening the reservation contain express language of termination, or, at the very least, clear language of cession?

3. Did the legislative history contain clear expressions from Congress of intent to disestablish the reservation boundaries, rather than merely intent to authorize non-Indian settlement?

This Court never has held reservation boundaries to be altered in the face of negative answers to *all three* of these fundamental questions.[3] Nor has any lower appellate court so ruled, except the South Dakota Supreme Court in its construction of the 1908 Act here at issue. Yet, that result is precisely what the State now seeks. *Amici* submit that this Court should not rule that Congress in 1908 terminated a large portion of the Cheyenne River Reservation without the Indians' agreement, without saying so in language of cession in the Act, and without any statements by members of Congress in the legislative history that they intended to do so.

2. There was no agreement of cession.

In both cases where this Court held reservations to be disestablished—*DeCoteau* and *Rosebud*—the Court stressed the importance of the Indians' agreement to cede the land to the United States in return for a sum certain payment by the United States. This Court ruled that the Indians' agreement is significant not because it was legally required to accomplish the result,[4] but because it provides

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[3] We do not suggest that other factors are entirely irrelevant, but they have been held supportive only. This Court never has used other factors—which are often ambiguous or inconsistent—to find disestablishment in the absence of the three primary guideposts stated above. At most, other factors, such as sections of an act transferring school lands to a State or barring intoxicants in the opened area, have been used as additional indicia supporting disestablishment where intent is otherwise clear based on the primary factors. Rosebud, *supra* at 591-92, 595-96, 599-601, 613-15.

[4] Under Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), this Court ruled Congress had the power to take tribal lands without consent. *See* Rosebud, *supra* at 588.

the clearest indication both that the Congress, in ratifying the agreements, intended to alter reservation boundaries, and that the Indians fairly understood this result would occur. Thus, where Indians agreed to sell their lands and the United States agreed to purchase the lands for a fixed price, the lands unconditionally ceded were no longer part of the reservation.[5] In *Mattz* and *Seymour*, on the other hand, this Court held that where no agreement was concluded with the Indians prior to opening lands for settlement, the clear Congressional intent necessary to a finding of disestablishment was lacking.

The Court in *DeCoteau* emphasized that it was "following and affirming the guiding principles of *Mattz* and *Seymour*." 420 U.S. at 449. The crucial distinction was the presence of a cession agreement. Thus, in *DeCoteau* the Court characterized the 1906 Colville statute at issue in *Seymour* as

> unilateral in character; like that in question in *Mattz*, it merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits. The *Seymour* Court was not confronted with a straightforward agreement ceding lands to the government for a sum certain. [420 U.S. at 488.]

By contrast, according to the Court, the 1891 Lake Traverse Act at issue in *DeCoteau*

> * * * is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. The 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50

[5] Rosebud and DeCoteau do not mean that all surplus lands acts preceded by an agreement necessarily terminate Reservation boundaries. In each case the history must be examined to determine whether the agreement and statute signified such an intent—as this Court held it did in Rosebud and DeCoteau.

> per acre—in payment for the express cession and relinquishment of "all" of the tribe's "claim, right, title and interest" in the unallotted lands. [420 U.S. at 488.]

In *Rosebud*, the Court reaffirmed the importance of a cession agreement. Here, a three-fourths majority of the Indians had agreed in 1901 to cede all their unallotted lands in Gregory County to the United States for a sum certain.[6] This agreement for an outright sale and purchase again provided the strongest evidence of intent to disestablish. As the Court stated:

> [T]he effect and intent of the 1901 Agreement, if ratified, would have been to change the Reservation boundaries. * * * In this Agreement, therefore, we have—unlike the situation in *Mattz* v. *Arnett* . . . — an unmistakable baseline purpose of disestablishment. [*Rosebud*, *supra* at 592.]

Congress in the 1904 Rosebud Act ratified and amended[7] the 1901 Agreement, clearly stating that it intended to maintain the "baseline purpose of disestablishment" manifested in the 1901 Agreement.[8]

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[6] Article 12 of the Treaty of April 29, 1868, 15 Stat. 635, required the consent of three-quarters of the adult males for a valid Sioux land cession. *See* United States v. Sioux Nation, 448 U.S. 371, 376 (1980).

[7] The amendment concerned the form of payment for ceded lands. Rather than have the United States pay a sum certain, the land was opened to homesteaders, with the Indians to be paid only from money received from the homesteaders. As this Court stressed, however, the disestablishment purpose of the absolute cession agreed to in 1901 was not altered by this amendment. Rosebud, *supra* at 594-96.

[8] The finding of intent to disestablish based upon the 1901 Agreement of cession also underlay the subsequent 1907 and 1910 Rosebud Acts. *See* Rosebud, *supra* at 605-6. No comparison of these latter statutes with the 1908 Act is valid, therefore, because the 1908 Act did not stem from any cession agreement. As the Court pointed out, "[t]he 1907 and 1910 Acts must be considered in con-

Other than the South Dakota Supreme Court in *State* v. *Janis*, 317 N.W.2d 133 (S.D. 1982), and *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977), which conflict with the opinion below in construing the 1908 Act, the lower courts invariably have acted in accordance with these principles. Where the Indians agreed to cede their lands to the United States, particularly for a sum certain, the courts have found reservations to be disestablished.[9] The courts have particularly noted that Congress viewed the agreement of the Indians as important where it sought to change reservation boundaries.

A leading example is the Pine Ridge Reservation in South Dakota, the boundaries of which were held to be altered in *United States ex rel. Cook* v. *Parkinson*, 396 F. Supp. 473 (D. S.D. 1975), *aff'd*, 525 F.2d 120 (8th Cir. 1975). The history of a 1910 Act regarding a portion of the Pine Ridge Reservation is examined in detail in that case. In 1908, a bill was introduced in Congress to obtain a cession of a portion of the reservation. Negotiations failed to obtain the consent of the Indians, who did not want to cede the lands in question, and the bill was not enacted. *Id.* at 482-84. A new bill was introduced, changing the lands to be ceded to encompass only lands in Bennett County. Negotiations regarding this new bill were successful, for the Indians agreed to cede the Bennett County lands. Thus, the bill which became the 1910 Act "was not a unilateral action by Congress but a negotiated agreement, to which a tribal majority consented." *Cook*, *supra* at 485. Even though this stat-

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text, and an important part of that context is the 1901 Agreement. . . ." Rosebud, *supra* at 606 n.30.

[9] Disestablishment was found, with the agreement of the Indians, in United States ex rel. Cook v. Parkinson, 396 F. Supp. 473 (D. S.D. 1975), *aff'd*, 525 F.2d 120 (8th Cir. 1975); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); United States v. Southern Pac. Trans. Co., 543 F.2d 676, 695 (9th Cir. 1976); United States v. Minnesota, 466 F. Supp. 1382, 1384 (D. Minn. 1979), *aff'd*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

ute was considered several years after *Lone Wolf* v. *Hitchcock*, *supra*, and Congress knew it could take tribal lands without consent, Congress did not take the major step of changing the boundaries of the reservation without such consent.

Where Congress merely was allotting and opening reservation lands to non-Indian settlement, where no agreement of cession was reached and Congress was acting unilaterally, as in the 1908 Cheyenne River Act, on the other hand, the lower courts have held that no intent to disestablish is manifest.[10] To escape this judicial pattern,

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[10] *See, e.g.*, City of New Town v. United States, 454 F.2d 121, 123 (8th Cir. 1972) (authorizing Secretary to "sell and dispose of" surplus unallotted lands); *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977) (authorizing Secretary to "sell and dispose of" surplus unallotted lands); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) (surplus unallotted lands "shall be disposed of" by the Secretary). The lack of agreement is seen as crucial by the courts. In *Namen*, for example, the Ninth Circuit stated that, in *Rosebud*, the Supreme Court

> based its conclusion that Congress intended the 1904 statute to diminish the Rosebud Reservation on this explicit link to the prior cession agreements. By contrast, there was no prior cession agreement whatsoever for the Flathead Act to ratify. [665 F.2d at 958.]

Without agreement by the Indians, disestablishment has been found in only two cases, and in each, congressional intent was clear on the face of the statute or its legislative history. In Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), the court construed an 1890 statute regarding the Round Valley Reservation in California. That act was enacted "to solve a very specific problem" regarding that reservation, *id.* at 920, the continued encroachment and settlement by non-Indians on lands guaranteed to the Indians. The solution, clearly expressed in the legislative history, was to create a smaller reservation, remove all non-Indians from it and protect the Indians in their smaller home. In Ute Indian Tribe v. Utah, Nos. 81-1827 and 81-1901 (10th Cir., Aug. 29, 1983), the Court of Appeals for the Tenth Circuit held that two series of statutes disestablished the Uncompahgre and Uintah Reservations. The earliest statute in each series—one in 1894 and one in 1902—expressly stated that unallotted reservation lands were to be "restored to the public domain". While the Ute Tribe did not agree to cession of their Reservations

petitioners in their brief, make much of remarks by Inspector McLaughlin during his meetings with the Cheyenne River Indians and his reports to the Secretary of the Interior. Brief of Petitioners, at 38-48. But the critical point is that, unlike Rosebud, the Cheyenne River Sioux did not agree to a cession of any of their lands, nor did these Indians accept Inspector McLaughlin's views. In short, Congress acted unilaterally in the 1908 Act opening surplus lands on the Cheyenne River Reservation for disposal to non-Indians. The fundamental "baseline purpose of disestablishment" of *Rosebud* and *DeCoteau*, manifested in a tribal cession agreement, thus is entirely lacking.

3. There was no statutory language of disestablishment, termination or cession.

In *DeCoteau* and *Rosebud*, the Court ruled that clear language of cession also shows an intent to disestablish.[11]

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as the two statutes had contemplated, the court of appeals ruled that Congress clearly indicated its intent in these earlier statutes that the lands lose reservation status. The Court of Appeals also ruled that, as in *Rosebud*, two later statutes (in 1897 and 1905, respectively) unilaterally opening surplus lands on these reservations simply carried out that congressional purpose. There is, of course, no earlier statute "restoring to the public domain" the lands of the Cheyenne River Reservation and no such clear language of disestablishment in the 1908 Act. Moreover—unlike the portion of the Cheyenne River Reservation opened by the 1908 statute—the Court of Appeals noted that the Utah reservations at issue in *Ute Indian Tribe* have large, majority populations of non-Indians and relatively few Indians residing upon them.

[11] As this Court stated in *Mattz*, Congress knew how to use language of express termination when it sought that result:

> Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ('the Smith River reservation is hereby discontinued'); 27 Stat. 63 (1892) (. . . providing that the North Half of the Colville Indian Reservation, 'the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain'), and Seymour v. Superintendent, 368 U.S., at 354; 33 Stat. 218 (1904) ('the reservation lines of the

The operative language in the 1891 Lake Traverse Act was that the Indians "hereby cede, sell, relinquish and convey to the United States all their claim, right, title and interest" to the unallotted lands. *DeCoteau, supra* at 445. This language, taken verbatim from the 1889 Agreement, was held "precisely suited" to disestablishment. Similar operative language of cession [12] appeared in the Rosebud 1904 Act, once again taken directly from the underlying 1901 cession Agreement.[13]

In contrast, during this same period, Congress used completely different operative language in many opening statutes. The 1892 Act opening the Klamath River Reservation, for example, provides that surplus lands "are hereby declared to be subject to settlement, entry and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone and timber lands." *Mattz, supra* at 495. Likewise, in the 1906 Colville Act, Congress simply authorized the Secretary of the Interior "to sell and dispose of unallotted lands" under the homestead, mineral and townsite laws of the United States. Act of March 22, 1906, ch. 1126, 34 Stat. 80; *Seymour, supra* at 355. In these cases, where Congress used no language of cession, the reserva-

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said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished').

Mattz, supra at 504 n.22.

[12] The Indians "cede, surrender, grant and convey to the United States all their right, title and interest" to the unallotted lands. *Rosebud, supra* at 597.

[13] In *Rosebud*, the 1907 and 1910 Acts contained no language of cession. In holding those Acts to disestablish portions of the reservation, the Court relied heavily on the "continued intent," *Rosebud, supra* at 614, expressed by Congress between the 1904 Act—which did contain express language of cession and was based on an agreement with the Indians—and the latter *Rosebud* Acts. *See* note 8 *supra*, at 10.

tions were held to continue and no disestablishment was found.[14]

The 1908 Act contains no language of cession. Like the statutes in *Mattz* and *Seymour*, the operative language of the 1908 Act merely authorized the Secretary to "sell and dispose of" unallotted surplus lands under the homestead and townsite laws. Moreover, other language on the face of the 1908 Act—not present in the 1904 Rosebud Act—strongly buttresses the conclusion that Congress intended continued Reservation existence. First, section 2 of the 1908 Act specified that allotments be provided to all the Indians of the Cheyenne River Reservation prior to opening the surplus land. Allotments could be selected by the Indians in either the opened or unopened portions of the Reservation. In fact, over 55% of the allotments selected by the Indians at Cheyenne River were in the area opened under the 1908 Act.[15] Nothing comparable to this continuing, or even expanded, Indian presence in the opened area was authorized in the 1904 Rosebud Act, which does not include any allotment provision. Second, section 2 of the 1908 Act also required the Secretary to determine if any coal lands existed and to reserve such lands from allotment or disposition. Congress could not have intended to reserve the Tribe's interest in minerals in the opened area, while at the same time terminating the status of that property as part of the Reservation. Significantly, the Rosebud statutes contain no mineral reservation provisions.

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[14] The lower courts have followed this teaching. *See* note 10 *supra*, at 12.

[15] *See* United States v. Juvenile, 453 F. Supp. 1171, 1200 (D.S.D. 1978), *citing* F. Hoxie, "Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908," at 38. The Hoxie Report was part of the record in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), *vacated and remanded*, 446 U.S. 980 (1980), and was incorporated as part of the record in this case.

Faced with operative statutory language which has been held by this Court to evidence an intent not to disestablish, and in light of other provisions in the 1908 Act which support continued Reservation existence, petitioners here emphasize the reference to a "diminished" portion of the Reservation in section 2 of the Act. As the Eighth Circuit stated, however, this ambiguous language could simply refer to the "diminished" Indian ownership of land within unchanged reservation boundaries. *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684, 687 (8th Cir. 1973). Further, such isolated, ambiguous language in an opening statute is not controlling. For example, in *Mattz*, the statute referred to "what was [the] Klamath River Reservation" (412 U.S. at 498), but no disestablishment was found. The isolated term cited by petitioners cannot overcome the absence of a cession agreement or clear language of cession in the 1908 Act—the two most critical factors developed by the Court.

4. The legislative history of the 1908 Act evidences no clear intent to disestablish.

With no agreement by the Indians, and no statutory language of cession, only the most unequivocal expressions by Congress in the legislative history could support a finding of disestablishment. The scant legislative history of the 1908 Act cannot bear such weight.

In the two Committee reports on the 1908 Act, references are made by the Committees simply to "opening" the Reservation to non-Indian settlement. S. Rept. No. 439, 60th Cong., 1st Sess. 4 (1908); H. Rept. No. 1539, 60th Cong., 1st Sess. 2 (1908). The Committees nowhere call for the altering of Reservation boundaries or mention a "cession."

Congressional debate on the 1908 Act was limited. Again, references to "opening" the Reservation appear: *e.g.*, 42 Cong. Rec. 7004 (1908) ("this bill opens a portion of the Cheyenne and Standing Rock Reservations") (Remarks of Cong. Sherman); 42 Cong. Rec. 7006

(1908) ("Prior to the time of the opening of that reservation the lands are not worth near so much money as they are after the farmers begin to come in, settle and build homes") (Remarks of Cong. Carter). No congressman spoke of a "cession" or of "terminating" or "extinguishing" or "altering" the Reservation boundaries. In short, Congress did not speak even briefly in terms supportive of a finding of disestablishment.[16]

With respect to legislative history, the contrast with *Rosebud* is striking. The legislative history of the 1904 Rosebud Act—statements by the Committee itself in its reports and statements by members of Congress—are filled with specific and clear references to the "cession" of land, and to changed reservation boundaries. For example:

a. "The Committee is informed the Indians are willing to treat a *cession* of the lands in question." H. Rept No. 486, 56th Cong., 1st Sess. 1 (1900).

b. "* * * the purpose [of the bill] of separating the Indians and *extinguishing the reservation* * * *." 35 Cong. Rec. 4807 (1902). (Remarks of Sen. Clapp)

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[16] Petitioners rely on the minutes of the meetings between Inspector McLaughlin and the Cheyenne River and Standing Rock Sioux Tribes, which were attached to the Committee reports. Inspector McLaughlin, of course, was not the United States Congress or a member of it. What Congress said is controlling. Where Congress intended disestablishment—as in *Rosebud*—congressional committees and congressmen clearly said so. Congressional intent should not be lightly inferred through McLaughlin's statements. This is particularly so because Inspector McLaughlin's talk at Cheyenne River, which was poorly attended and achieved no agreement, made no reference at all to reservation boundaries. Moreover, McLaughlin's statements at Standing Rock—to members of a different tribe—all were in the context of describing the sale of surplus lands. His references to the map at Standing Rock concerned determination of how large the opened area was to be and no jurisdictional consequences ever were discussed.

c. "* * * the Indians have no use for this land that is proposed to be *ceded by this bill.* * * * *the Reservation will be left compact and in a square about equal in size to the Pine Ridge Reservation, in South Dakota*" H. Rept. No. 443, 58th Cong., 2d Sess. 3 (1904). (Remarks of Cong. Burke) (Emphasis added.)

As these excerpts from the *Rosebud* legislative history convincingly demonstrate, where Congress intended disestablishment, it clearly said so. No such statements were made by Congress in enacting the 1908 Cheyenne River Act because no disestablishment was intended.[17]

5. Other Factors.

a. *The absence of "familiar forces."*

In the absence of a cession agreement, operative language of cession or a clear legislative expression of intent to disestablish, petitioners seek to rely on less significant factors. Petitioners argue, for example, that disestablishment should be found because the same "familiar forces" of land hungry non-Indians which led to disestablishment of the Rosebud Reservation also existed here. Petitioners ignore the facts. Unlike the statutes at issue in *Rosebud*, the 1908 Act was not a response to land hungry mobs requiring immediate termination of Reservation boundaries. The Act was merely an opening and allotment statute, pursuant to Congress' predominant policy of encouraging non-Indians to settle on reservations,

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[17] Petitioners infer from the fact that the same United States Senator from South Dakota introduced both this legislation and the Rosebud Acts that the consequences for the reservation boundaries must be the same. Similarly, petitioners argue that Inspector McLaughlin's presence as a government representative on both reservations supports a holding of disestablishment. The dispositive issue, though, is not whether the actors were the same, but rather the script of the play as written by *Congress*. With respect to the 1908 Act, the statements of members of Congress in the Committee reports they wrote or the remarks they made on the floor indicate only an intent to open unallotted surplus lands of the Reservation to settlement—nothing more.

to teach Indians the settlers' ways, leading gradually toward assimilation and an eventual termination of tribal relations and reservation existence.

Contrary to petitioners' contention, "familiar forces" were not everywhere the same. At Rosebud, prior to the 1904, 1907 and 1910 statutes, there was intense pressure by masses of near-by settlers clamoring for land on the Rosebud Reservation. When the Rosebud Reservation was opened, land offices were swamped, and the land available immediately swallowed up.

> By the time of the 'opening' of Gregory County, congressional desire for Indian lands was reaching a crescendo. The Gregory County Act provided for approximately 2,422 homesteads of 160 acres each. About a quarter of a million people descended upon the local land offices at Bonesteel, Fairbax, Chamberlain, and Yankton, and 106,308 of these completed applications to be eligible for these 2,422 homesteads. At the Yankton Office, where 57,434 applications were filed, the crowds . . . broke all previous records. The same is true for the Tripp County and Mellette County Acts. A total of 114,769 persons applied for 4,000 homesteads in Tripp County and a similar occurrence was the story of Mellette County.

Smith, *New Town: A Reply*, 18 S.D.L. Rev. 327, 332-33 (1973).

As to lands opened under the 1908 Cheyenne River Act, on the other hand, land pressure was slight. In 1913, when Congress was considering a bill to open the eastern portion of the Standing Rock Reservation, Congress was well aware that the land rush at Rosebud had not been repeated at Cheyenne River and Standing Rock after the 1908 Act. This was illustrated in the following House debate:

> Mr. MANN. Is the gentlemen from South Dakota able to tell the House how many people went up to the Dakotas at the opening of the Rosebud land?
>
> Mr. BURKE of South Dakota. I will say to the gentleman, if he refers to the first opening, which

was that portion in Gregory County, and which was opened, I think, by an act passed in the Fifty-eighth Congress, that there were something like 100,000 people.

Mr. MANN. How many people out of that number were permitted to get homesteads?

Mr. BURKE of South Dakota. There were about 2,500 160-acre tracts, as I remember.

Mr. MANN. That was a very profitable thing for the railroad companies.

Mr. BURKE of South Dakota. I want to say to the gentleman that there has been no opening since that time where there has been anything like that number of people. At the opening of the Cheyenne and the Standing Rock Reservations [under the 1908 Act] which was next to the last one in our State, *there were not sufficient people to begin to take anywhere near the land that was to be disposed of*, and the reason they did not take it was the price of the land, which was undoubtedly too high. [49 Cong. Rec. 1106 (1913) (emphasis added)]

The pressure at Rosebud immediately to terminate the reservation to make way for hordes of settlers obviously was not felt at the Cheyenne River and Standing Rock Reservations in 1908. Rather than a reaction to urgent pressure for land, the 1908 Act was simply an implementation of Congress' fundamental allotment policy of the era. *See Mattz, supra* at 496-97.[18]

b. *Subsequent legislation supports continued Reservation existence.*

Congress, on a number of occasions, has expressed its understanding that the area opened under the 1908 Act remained within the Reservation. In 1910, Congress enacted a law authorizing the sale of lands "in the Chey-

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[18] Allotment looked toward the "*eventual* assimilation [of the Indians] into our society." Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added). The entire policy was "repudiated in 1934 by the Indian Reorganization Act." *Mattz, supra* at 497 n.18.

enne River Indian Reservation" to the Milwaukee Land Company. Act of June 23, 1910, ch. 369, 36 Stat. 602. The land "in" the Reservation was land opened under the 1908 Act. H.Rept. No. 1046, 61st Cong., 2nd Sess. 1 (1910). In 1913, Congress enacted a law to open to non-Indian settlement all surplus lands of the Standing Rock Sioux Reservation not covered by the 1908 Act. Act of February 14, 1913, ch. 54, 37 Stat. 675. Section 1 of the 1913 Act authorizes "[t]he Secretary of the Interior * * * to sell and dispose of all *that portion of the Standing Rock Indian Reservation* * * *" within described boundaries "except such portions as have been allotted to Indians." The italicized language and lengthy metes and bounds description are significant. If the 1908 Act really had altered the Reservation boundaries, Congress would not have termed the area to be opened by the 1913 Act a "portion of the Standing Rock Indian Reservation." The "portion" would have been the entire reservation. Nor would a metes and bounds description half a page long have been included; the act could simply have directed the Secretary to "sell and dispose of all remaining unallotted lands of the Reservation." These Acts show Congress, close in time to the 1908 Act, understanding that the 1908 Act did not change Reservation boundaries. Other statutes, over a long time span, reaffirm Congress' understanding. Act of May 28, 1914, ch. 102, 38 Stat. 383 (extension of time for homestead entries); Act of March 4, 1921, ch. 174, 41 Stat. 1446, 1447 (same); Cheyenne River Oahe Settlement Act of September 3, 1954, ch. 1260, 68 Stat. 1191; Submarginal Lands Act of 1975, 25 U.S.C. §§ 459-459e (1976), Pub. L. No. 94-114, 89 Stat. 577.

6. A ruling of disestablishment will have grave consequences for the Cheyenne River Sioux Indians.

The 1980 Census shows that 2,920 or 65.6% of the 4,449 Indians residing in Dewey and Ziebach Counties, South Dakota (which comprise the entire Reservation),

actually live in the opened area. U.S. Census Enumerated Districts, South Dakota, Nos. N009A-N1830A, A001-A0013B, A1800-A1838. *See* U.S. Census Bureau 1980 Census Summary Tape File 1-A (South Dakota). The opened area alone has a total population of 5,848, of whom 49.93% are Indians. *Id.* The tribe, the Bureau of Indian Affairs, the Indian Health Service and various tribal enterprises employ a substantial number of non-Indians, and other non-Indians are members of Indian families by marriage. While the figures cannot be ascertained with precision, no doubt exists that tribal members and persons directly associated with the Tribe constitute a majority of the opened area population.

As explained above, when allotments were selected by tribal members in 1908, a majority chose to locate in the opened portion of the Reservation. The town of Eagle Butte, which lies wholly within the opened area, is the seat of tribal government and the site of most BIA and IHS facilities on the Reservation. Eagle Butte, where respondent's offense is alleged to have occurred, is 78.5% Indian. *Id.*

Unlike both *DeCoteau* and *Rosebud*, therefore, this case does not involve a geographic area composed primarily of fee lands and populated predominantly by non-Indians. *See DeCoteau*, *supra* at 428; *Rosebud*, *supra* at 605-606. Rather, the opened area of the Reservation contains the great majority of the tribal population and serves as the center of the Tribe's economic and political existence.

If the Court were to rule that the Reservation has been disestablished, the impact upon the Tribe and its members will be dramatic. In terms of criminal jurisdiction, for example, the state currently has no authority to try offenses committed by Indians within the opened area, regardless of the identity of the victim and regardless of whether the situs of the crime is fee, allotted or tribal

land.[19] *Cf. United States* v. *John*, 437 U.S. 634 (1978); *Ex parte Crow Dog*, 109 U.S. 556 (1883). If disestablishment is found, on the other hand, offenses by Indians against either Indians or non-Indians which take place on fee lands generally will fall under state jurisdiction. *See Organized Village of Kake* v. *Egan*, *supra*; *Ward* v. *Race Horse*, 163 U.S. 504 (1896).

This Court, in the past, has recognized the unfairness of subjecting Indian offenders to state law. Indian defendants, living in the tribal community and accustomed to having their conduct appraised under tribal law, would suddenly find themselves under

> 'authority and power which seeks to impose upon them the restraints of an external and unknown code. . .; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . .'

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978), quoting *Ex parte Crow Dog*, *supra* at 571. Moreover, apart from hardship for individuals, the Tribe and the United States would be faced with the virtually impossible task of seeking to maintain law and order in a checkerboarded territory, one-half of which lies beyond their reach. See *Seymour*, *supra* at 358.

In terms of civil jurisdiction and, more particularly, the operation of tribal economic programs, a finding of disestablishment would cause even greater disruption. While the existence of a reservation only rarely affects

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[19] The Tribe has exclusive jurisdiction over crimes committed by Indians against Indians, *see* United States v. Quiver, 241 U.S. 602 (1916), unless the offense falls within the Major Crimes Act, 18 U.S.C. § 1153 (1976). Similarly, the Tribe and/or the United States has jurisdiction over crimes by Indians against non-Indians, while the state does not. 18 U.S.C. § 1152 (1976).

state power over non-Indians (*see* pp. 25-27, *infra*), the reservation border serves Indian people as the last and best defense against state intrusions into their right "to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). "[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves free from state interference. . . ." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965). *See Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy of fostering tribal self-government is also the touchstone of current federal Indian policy. *See Ramah Navajo School Board* v. *Bureau of Revenue*, 102 S.Ct. 3394, 3400 (1982); *New Mexico* v. *Mescalero Apache Tribe*, 103 S.Ct. 2378, 2386 (1983).

The existence of a reservation clearly is crucial to the Tribe's full exercise of its sovereign powers. Thus, in the absence of congressional enactments authorizing state jurisdiction, "there has been no satisfactory authority for [state control over] Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . ." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Unless Congress speaks to the contrary, however, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

For the members of the Tribe in the opened area, therefore, disestablishment of the Reservation would bring them suddenly and involuntarily within the ambit of state contract, tort and sales tax laws, not to mention laws relating to such vital tribal concerns as hunting and fishing, domestic relations, land use planning and the political process. It is no answer to say, as petitioners may, that the Tribe will retain jurisdiction over trust lands in the opened area. *See DeCoteau*, *supra* at 427 n.2. Even given this tribal jurisdiction, the application of state law

in the opened area will be pervasive and the ability of the Tribe to carry on self-government or the federal government to implement its traditional Indian policy will be seriously compromised.

The point is that after building their homes and making their livelihoods in the opened area for 75 years, free from State interference, Indians will discover suddenly that they do not live on a reservation at all. They will find themselves without the protection of the tribal and federal governments. The political, economic, social and cultural displacement will be most profound, and shake the tribal society to its roots.

7. A finding of continued reservation status will not adversely affect non-Indians in the opened area.

If the Court holds that the Reservation has not been disestablished, the division of jurisdiction among federal, state and tribal governments over crimes by non-Indians will not differ materially from their respective authorities in the event of disestablishment. The Tribe, of course, has no power today to try and punish non-Indians for offenses against tribal law under any circumstances. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Crimes committed by non-Indians against non-Indians today fall within state jurisdiction whether or not the situs of the crime is Indian country. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *Draper* v. *United States*, 164 U.S. 240 (1896); *United States* v. *McBratney*, 104 U.S. 621 (1881). Also, regardless of whether the opened area is disestablished, crimes committed by non-Indians against Indians which take place on trust allotments or within dependent Indian communities will remain within the exclusive jurisdiction of the United States. 18 U.S.C. §§ 1151(b) and (c), 1152 (1976); *Williams* v. *United States*, 327 U.S. 711, 714 (1946).

For non-Indians, therefore, the only difference in criminal jurisdiction between disestablishment and continued

reservation status occurs in the event a non-Indian commits a crime against an Indian on fee patented lands outside a dependent Indian community. Such crimes in the opened area would be under federal jurisdiction if the Reservation is preserved, 18 U.S.C. § 1151(a) (1976), but will come under state jurisdiction if the Reservation is disestablished. That difference, however, is largely immaterial, since, unlike the Indian in state court, neither federal nor state court is foreign to a non-Indian.

A similar result obtains with regard to civil jurisdiction. The Court previously has intimated that the statutory definition of Indian country, found at 18 U.S.C. § 1151, also defines tribal territorial jurisdiction. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *see also Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). In *Montana* v. *United States*, 450 U.S. 544 (1981), however, the Court made clear that the mere presence of non-Indians within Indian country does not necessarily give rise to tribal civil jurisdiction over those non-Indians. Instead, tribal authority over non-Indians must be premised upon entry into tribal land, consensual dealing with the tribe or its members, or conduct directly affecting the political integrity, economic security, or health and welfare of the tribe. *Id.* at 565-66. By and large, therefore, even if reservation status is maintained, the conduct of non-Indians except on trust lands within the opened area will be free of tribal control.

Similarly, state civil authority over non-Indians is not dependent upon whether the non-Indians are within or without reservation boundaries. Unless the application of state law directly affects Indians, tribes, their property or federal activities, state law applies with full force to non-Indians on the reservation. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973); *see also Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930); *Thomas* v. *Gay*, 169 U.S. 264 (1898).

Thus, the state can tax real property on the reservation owned by non-Indians, *cf. Maricopa & Phoenix Railroad Co.* v. *Arizona Territory*, 156 U.S. 347 (1895); *Utah & Northern Railway Co.* v. *Fisher*, 116 U.S. 28 (1885), unless, of course, such taxes are preempted by federal law. Absent preemption, the state also can tax personal property owned by non-Indians. *Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118 (1906). Essentially, except for the rare class of cases in which important federal and tribal interests would be compromised, *see, e.g., Ramah Navajo School Board* v. *Bureau of Revenue*, *supra*, the state is free to regulate and tax non-Indian persons, property, and activities whether or not they are located or occur within a reservation. *See Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980). In short, to disestablish the Reservation would add little to the authority of the state over non-Indians in the opened area, while a finding of continued reservation status would give little additional power over non-Indian activities to the Tribe.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the decision of the court below be affirmed.

Respectfully submitted,

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